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IN THE

Supreme Court of the United States

ELAINE L. CHAO, SECRETARY OF LABOR,

Petitioner,

v.

MALLARD BAY DRILLING, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, DREDGING CONTRACTORS OF AMERICA AND NATIONAL MARITIME SAFETY ASSOCIATION IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether the OSHA's enabling statute overrides the Coast Guard's enabling statute.[1]

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1. In accordance with this Court's Rule 37.6, counsel of record states that he is the sole author of this brief and that no person or entity, other than the named amicus parties, has made a monetary contribution to the preparation or submission of this brief.

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INTRODUCTORY STATEMENT

This case illustrates the danger that arises when the Executive Branch speaks with a single voice about a conflict between the enabling statutes of two different agencies. The danger is that the meaning of one statute will be sacrificed in a policy decision to favor the other statute. Here the Executive Branch, in its administrative actions and in its brief to this Court, has improperly expanded OSHA's reach into responsibilities that the Legislative Branch has reserved for the Coast Guard. The Coast Guard may have acquiesced in OSHA's assumption of responsibilities on the "waters subject to the jurisdiction of the United States," 14 U.S.C. § 2, but the Congress has not.

INTEREST OF THE AMICI AND CONSENT OF THE PARTIES

The Associated General Contractors of America (AGC) is a national trade association representing 34,000 construction contractors, many of whom construct maritime projects on or over navigable waterways or otherwise provide services in the marine environment.

The Dredging Contractors of America (DCA) is a national trade association representing 21 contractors that perform dredging services, primarily to federal, state and local government agencies

Members of both AGC and DCA use vessels of the kind at issue here on a daily basis, and are thus subject to the overlapping jurisdictional claims of the Coast Guard and the OSHA.

The National Maritime Safety Association (NMSA) is a national trade association of marine terminal operators and stevedoring companies, all of whom occasionally utilize vessels

of the kind at issue here, and some of whom utilize vessels on a daily basis at "mid stream" transfer facilities. NMSA members also encounter the overlapping jurisdictional claims of the Coast Guard and the OSHA.

Marine safety is an important issue for the members of the Amici. Dual jurisdiction confuses industry safety programs. Amici thus have a safety interest in resolving the jurisdictional conflict presented in this case.

The parties have consented to the filing of this brief. Letters of consent have been filed with the clerk pursuant to Rule 37.3 of the Court.

STATUTES INVOLVED

14 U.S.C. § 2

> The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the United States; shall administer laws and **promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department**; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, icebreaking facilities, and rescue facilities for the promotion of safety on, under, and over the high

> seas and waters subject to the jurisdiction of the United States; shall, pursuant to international agreements, develop, establish, maintain, and operate icebreaking facilities on, under, and over waters other than the high seas and waters subject to the jurisdiction of the United States; shall engage in oceanographic research on the high seas and in waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war, including the fulfillment of Maritime Defense Zone command responsibilities. [Emphasis added.]

HISTORY: **Aug. 4, 1949**, ch 393, § 1, 63 Stat. 496; Oct. 5, 1961, P.L. 87-396, § 1, 75 Stat. 827; June 12, 1970, P.L. 91-278, § 1(1), 84 Stat. 304; Dec. 13, 1974, P.L. 93-519, 88 Stat. 1659; Nov. 10, 1986, P.L. 99-640, § 6, 100 Stat. 3547; Sept. 28, 1988, P.L. 100-448, § 17, 102 Stat. 1845; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle L, § 7403, 102 Stat. 4484. [Emphasis added.]

29 U.S.C. § 653(b)(1)

> **Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies**, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended, **exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.** [Emphasis added.]

HISTORY: **Dec. 29, 1970**, P.L. 91-596, § 4, 84 Stat. 1592. [Emphasis added.]

FACTUAL STATEMENT

This case involves OSHA safety violation citations against a drilling barge that exploded from leaking gas while anchored and drilling in a navigable waterway. The OSHA issued the citations pursuant to an agreement with the Coast Guard giving the OSHA jurisdiction over vessels that the Coast Guard is not required by statute to inspect. *Mallard ~~Bay Drilling~~, Inc. v. Herman*, 212 F.3d 898, 898-99 (5th Cir. 2000), Petition App. ("PA") at 2a; *Secretary of Labor v. Mallard Bay Drilling, Inc.*, Occupational Safety and Health Review Commission, Docket No. 97-1973, ALJ Decision at PA10a-11a. The Coast Guard had issued a Certificate of Documentation to the barge, even though it considers the barge to be an uninspected vessel. ALJD at PA11a.

The Coast Guard is required to investigate marine casualties such as the explosion of this barge, and did so. *Marine Casualty Narrative Supplement* at PA24a. The Coast Guard found the explosion to be a "Major Marine Casualty." PA24a. Accordingly, the Coast Guard investigated "the issues of hazard recognition, written procedures, engineering, and overall crew competency." PA25a. OSHA conducted no separate investigation, but issued its safety violation citations on the basis of the Coast Guard's investigative findings. ALJD at PA12a.

SUMMARY OF ARGUMENT

The OSHA is not an expert in the safety of vessels operating in open water. It relies on the Coast Guard to find violations for it, as happened in this case. Indeed, the OSHA has no inspection boats. For reasons of bureaucracy, not

expertise, the Coast Guard has been persuaded to give part of its safety jurisdiction to the OSHA.

This bureaucratic realignment is against the will of the Congress, and makes no more sense than if the OSHA were to give the Coast Guard safety responsibility for manufacturing plants on dry land. Both agencies should fulfill their own statutory responsibilities.

This Court may wish to note that, despite *OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the Secretary of Labor is still using presumptions to shift the burden of proof, this time for the purpose of expanding the jurisdiction of the OSHA. *See* footnotes 2 and 3, *infra*, and the related text.

ARGUMENT

Congress has specifically given the Coast Guard the responsibility for the "safety of life and property" on "waters subject to the jurisdiction of the United States." Congress has given the OSHA some shore side responsibility but has not given the OSHA any open water responsibility. Therefore, under the express terms of 14 U.S.C. § 2, the open water responsibility rests exclusively with the Coast Guard, and the Coast Guard may not reassign any part of that responsibility to the OSHA.

The ALJ held — as he was required to do under the Labor Department regulations controlling his work — that there is a presumption that OSHA jurisdiction preempts that of the Coast Guard, and that the rebuttal of the preemption is an affirmative defense in which the employer bears the burden

of proving that the Coast Guard has actually regulated the "workplace." PA14a-15a.[2] This presumption, and the shifting of the burden of proof with respect to it, demonstrate the administrative bias in favor of OSHA.[3] Under Labor Department

2. The ALJD said, at PA14a-15a (emphasis added):

> Where the **employer claiming the exemption satisfies its burden of proving** that another agency has exercised its authority, OSHA jurisdiction will be preempted only as to those working conditions actually covered by the agency regulations. *Alaska Trawl Fisheries, Inc.*, 15 BNA OSHC 1699, 1703-1704 (No. 89-1192, 1992). The term 'exercise,' as used in § 4(b)(1), requires an **actual assertion of regulatory authority as opposed to a mere possession of authority**. OSHA jurisdiction will be preempted only as to those working conditions actually covered by the agency regulations. *Id* at 1703-1704.
>
> In the *Alaska Trawl* case, the Commission found that, in the absence of relevant Coast Guard regulations, OSHA jurisdiction over work performed on uninspected vessels was not preempted. There was no industry-wide exemption from OSHA regulations. The Commission dismissed as dictum the implication that *Dillingham Tug & Barge Corp., 10 BNA OSHC 1859* (No. 77-4143, 1982), created an industry-wide exemption. *Id* at 1704-1705. Absent an industry wide exemption, **OSHA jurisdiction is preempted only if the Coast Guard has specifically regulated the cited condition**.

3. *Cf. OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994) (the Secretary of Labor may not use a presumption as a device to shift the burden of proof). In the present case, in fact, the wording of the Coast Guard statute creates a presumption that the OSHA has no jurisdiction.

regulations, OSHRC administrative judges may not even consider what the Coast Guard statute says; they may only consider what the Coast Guard does. *See* footnote 2, *supra*. Petitioner justifies this bias by referring to the jurisdictional agreement between the OSHA and the Coast Guard. Pet.Br. at 2-4. Petitioner dismisses the Coast Guard's enabling statute, not after analyzing its meaning, but by asserting that the Coast Guard's statutory authority does not apply to vessels that the latter is not statutorily required to inspect. *Id*. So totally does Petitioner dismiss the significance of the Coast Guard's enabling statute that Petitioner does not even recognize it as a "Statutory Provision Involved." Pet.Br. at 2. The only statute that the Petitioner recognizes as being "involved" in this case is the OSHA statute.

Petitioner's approach cannot be squared with the plain meaning of 14 U.S.C. § 2, which says that jurisdiction over safety in the waters of the United States rests with the Coast Guard unless the Congress has "specifically" assigned a part of that responsibility to another agency. Because the Congress has not "specifically" assigned to the OSHA any jurisdiction over vessels in navigable channels, the only possible reading of 14 U.S.C. § 2 is that the Congress has required that jurisdiction to remain with the Coast Guard.[4] The appellate courts that have found OSHA jurisdiction on navigable waterways have done so by ignoring the Coast Guard statute.[5] The analysis of those

4. "In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

5. Because the Coast Guard has failed to defend its statutory jurisdiction, the appellate courts typically have accepted the Secretary

(Cont'd)

courts has been perfunctory, presumably because they have failed to see the harm in having the OSHA share the Coast Guard's jurisdiction as long as the Coast Guard is consenting. The harm is that the Coast Guard knows what it is doing, and the OSHA does not. The harm is also that the OSHA has typically made its presence felt by hyper-regulation.

Deference to an agency interpretation is not a substitute for statutory review. As this Court said in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475-76 (1992):

> The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written. The principle can at times come into some tension with another fundamental principle of our law, one requiring judicial deference to a reasonable statutory interpretation by an administering agency. [Citations omitted.] Of course, **a reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms.** [Emphasis added.]

In 1982, the OSHRC did read the Coast Guard enabling statute and did follow the congressional purpose.

(Cont'd)
of Labor's assertion that the only relevant statute is the OSH Act, which gives broad general jurisdiction to the OSHA. In effect, the Coast Guard has repeatedly waived its own enabling statute, and the courts have accepted the waiver without question. The Fifth Circuit in the present case, having considered the applicability of the Coast Guard enabling statute, has held that the Coast Guard has been prohibited by the Congress from waiving its exclusive open water jurisdiction in favor of the OSHA.

In *Dillingham Tug & Barge Corp.*, 10 OSH Cas. (BNA) 1659, 1982 OSHRC LEXIS 150 (reprinted as an appendix hereto for the Court's convenience), the OSHRC "examined the manner in which the Coast Guard has exercised its statutory authority to regulate the health and safety of seamen aboard vessels operating on navigable waters" and "conclude[d] that section 4(b)(1) [of the OSH Act] precludes the Secretary from enforcing the OSH Act with respect to such working conditions." 5a-6a hereto. The OSHRC looked at the scope of the Coast Guard's statutory authority, and rejected the argument that the Coast Guard was failing to regulate vessels that it was not required by statute to inspect. The OSHRC held:

> [T]he Coast Guard's reliance on its authority over inspected vessels to undertake certain regulatory activities does not imply that it believes it has no authority over uninspected vessels. The Coast Guard has statutory authority to "promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department. . . ." *14 U.S.C. § 2.* The Coast Guard's general statutory authority thus extends to all vessels in navigation. Cf. *Foremost Insurance Co. v. Richardson, 50 U.S.L.W. 4778, 4780-81* [457 U.S. 668, 669] (June 23, 1982) (Coast Guard regulations designed to prevent collisions on navigable waters apply to all vessels without regard to their commercial or noncommercial nature).[6]

6. This Court's *Richardson* decision, cited in the passage just quoted, rejected the position of the dissenting appellate judge in that
(Cont'd)

8a hereto. The OSHRC decision then rejected the argument that the Coast Guard regulation of uninspected vessels was insufficient. The OSHRC said:

> As discussed above, the Coast Guard has issued extensive regulations applicable to all vessels operating on navigable waters except certain vessels owned by the United States. The Coast Guard regulations are directed at protecting the health and safety of seamen. *Taylor v. Moore-McCormick Lines, Inc., 621 F.2d 88 (4th Cir. 1980); Clary v. Ocean Drilling and Exploration Co., 609 F.2d 1120 (5th Cir. 1980).* Thus, employers of seamen, such as Dillingham, must look to the Coast Guard regulations for the requirements they must comply with to protect their employees. Under the approach of the majority in Puget Sound [advocated by OSHA] such employers would also be required to compare the Coast Guard regulations with OSHA regulations, determine which conditions of the work environment are not addressed by Coast Guard regulations, and comply with OSHA requirements directed at those working conditions. This approach necessarily assumes that the Coast Guard regulations are insufficient to provide adequate protection to seamen aboard vessels on navigable waters. It is thus inconsistent with the established rule that section 4(b)(1) [of the OSH Act] does not permit an inquiry

(Cont'd)
case, who argued that not all navigable waterways are important enough to be included within the admiralty jurisdiction of the United States. 457 U.S. 668, 672 n.3. The Petitioner here similarly argues that not all vessels are important enough to be under the jurisdiction of the Coast Guard.

> into the stringency of another agency's exercise of authority. "Once another Federal agency exercises its authority over specific working conditions, OSHA cannot enforce its own regulations covering the same conditions. Section 4(b)(1) does not require that another agency exercise its authority in the same manner or in an equally stringent manner." Mushroom Transportation Co., *73 OSAHRC 51/E10, 1 BNA OSHC 1390, 1392, 1973-74 CCH OSHD P16,881 at p. 21,591* (No. 1588, 1973). See also Northwest Airlines, Inc., *80 OSAHRC 87/B5, 8 BNA OSHC 1982, 1990, 1980 CCH OSHD P24,751 at p. 30,489* (No. 13649, 1980); Pennsuco Cement and Aggregates, Inc., *80 OSAHRC 47/A2, 8 BNA OSHC 1378, 1980 CCH OSHD P24,478* (No. 15462, 1980).

10a-11a hereto. The OSHRC concluded by recognizing that "the Coast Guard is better able than OSHA to focus on the overall problem of safety on navigable waters due to its broad statutory authority over the subject." 13a hereto at n.10.

In *Dillingham*, the OSHRC refused to allow the OSHA's agreement with the Coast Guard to create a confusing "nook and cranny" division of jurisdiction, in which OSHA looked at each discrete safety item to determine whether the Coast Guard was regulating that particular item and then stepped in to bridge any gap. 5a hereto. Ten years later, in *Alaska Trawl Fisheries*, 15 OSH Cas. (BNA) 1699, 1992 OSAHRC LEXIS 70 (1992), the OSHRC dismissed its entire *Dillingham* decision as "dictum" and resumed marching to the same drummer as the Secretary of Labor. *See* footnote 2, *supra*.

In the present case the Fifth Circuit has refused to countenance the return to the "nook and cranny" approach. The Ninth Circuit, however, has recently decided in favor of that approach, and has even approved of requiring an oceangoing tug working in Alaska territorial waters to keep records for the OSHA in a style different from that required for the same information by the Coast Guard. *Herman v. Tidewater Pacific, Inc.*, 160 F.3d 1239 (9th Cir. 1998). With great respect for the Ninth Circuit, we suggest that its decision makes no sense from any perspective other than letting each agency have a "piece of the action." That perspective satisfies neither the Congressional intent nor sound administrative practice, and should be rejected by this Court.

CONCLUSION

For the reasons stated, the decision of the Fifth Circuit in this case should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX — DECISION AND DISSENTING OPINION OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION DATED JULY 29, 1982

DILLINGHAM TUG AND BARGE CORPORATION

OSHRC Docket No. 77-4143

Occupational Safety and Health Review Commission

1982 OSAHRC LEXIS 150; 1982 OSHD (CCH) P26,166

July 29, 1982

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

COUNSEL:

Office of the Solicitor, USDOL

Daniel W. Teehan, Regional Solicitor, USDOL

John R. Lacy, for the employer

OPINION:

DECISION

BY THE COMMISSION:

Following an accident that resulted in the death of one of Dillingham Tug & Barge Corporation's seamen, the Secretary of Labor cited Dillingham for allegedly violating

section 5(a)(1)[1] of the Occupational Safety and Health Act of 1970[2] ("the Act" or "the OSH Act"). Dillingham contends that the Secretary lacks jurisdiction over the working conditions of seamen, and that pursuant to section 4(b)(1) of the Act,[3] the Secretary was precluded from issuing the citation by virtue of Coast Guard regulation of the cited working condition. Administrative Law Judge Jerry W. Mitchell rejected Dillingham's arguments and affirmed the citation.[4] Dillingham filed a petition asking the Commission to review the judge's decision. Pursuant to section 12(j) of the Act, *29 U.S.C. § 661*(1), former Commissioner Barnako directed review on the following issue:

---

1. Section 5(a)(1), *29 U.S.C. § 654*(a)(1), provides:

> Sec. 5.(a) Each employer —
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

2. *29 U.S.C. § § 651*-678.

3. Section 4(b)(1), *29 U.S.C. § 653*(b)(1), provides in pertinent part:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

4. Dillingham and the Secretary entered into a partial settlement agreement by which, if Dillingham's arguments relating to the Secretary's authority to issue the citation were rejected, the citation would be affirmed.

Whether the administrative law judge erred in concluding that the U.S. Coast Guard did not exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health respecting the working conditions involved herein, and therefore that Respondent Dillingham Tug & Barge Corporation was not exempt from the requirements of the Act.

For the reasons that follow, we reverse the judge's deci..on and vacate the citation.

I

Dillingham provides towboat services to vessels in the navigable waters surrounding Hawaii. On July 3, 1977, two towboats owned and operated by Dillingham, the MAPU and the MA'A, were assigned to help moor an oil tanker, the AEGEAN ISLAND, at an anchorage approximately two miles offshore from Barbers Point, Oahu, Hawaii.

To accomplish the mooring operation, the towboats had to run lines from the AEGEAN ISLAND to certain mooring buoys located in the anchorage. Some of the mooring lines were secured without difficulty. Two of the lines, however, proved to be too short to reach the appropriate buoys. To secure these lines, the MAPU pushed the buoys toward the MA'A, which held the lines that ran from the AEGEAN ISLAND. A seaman on board the MAPU, Francis Kane, then boarded the buoys to assist the crew of the MA'A secure the lines. After the lines were secured, the MAPU proceeded to the final buoy so that Kane could again come on board. When the MAPU was near the buoy, Kane lost his balance, fell

from the buoy, and was crushed between the MAPU and the buoy. The Coast Guard investigated the incident and found no evidence that it involved any violation of law or regulation. The Secretary also conducted an investigation and cited Dillingham for allegedly violating section 5(a)(1) of the OSH Act.

II

In Puget Sound Tug & Barge, *81 OSAHRC 50/A2, 9 BNA OSHC 1764, 1981 CCH OSHD P25,373* (No. 76-4905, 1981),[5] a divided Commission rejected the argument that section 4(b)(1) precludes the Secretary of Labor from citing an employer for alleged violations of the OSH Act that involve the working conditions of seamen aboard vessels on navigable waters. The majority viewed this argument as seeking an "industry-wide exemption" from the Act and rejected the argument on the basis of precedent holding that "section 4(b)(1) was not designed to create industry-wide exemptions, but rather exemptions only over those working conditions that have been the subject of an exercise of another agency's statutory authority to regulate occupational safety and health." *9 BNA OSHC at 1775, 1981 CCH OSHD at p. 31,595.* The majority cited, among other cases, *Southern Pacific Transportation Co. v. Usery, 539 F.2d 386 (5th Cir. 1976),* cert. denied, *434 U.S. 874 (1977),* and *Southern Railway Co. v. OSHRC, 539 F.2d 335* (4th Cir.), cert. denied, *429 U.S. 999 (1976).* Thus, although acknowledging that the Coast Guard possessed broad statutory authority to issue regulations promoting safety on navigable waters and that

5. Appeals filed, Nos. 81-7405 and 81-7406 (9th Cir. June 26, 1981); No. 81-4243 (5th Cir. June 24, 1981).

the Coast Guard had issued regulations pursuant to this authority, the majority concluded that the Coast Guard's exercise of authority did not entirely exempt from the Act the working conditions of seamen aboard vessels on navigable waters. Instead, the majority concluded that section 4(b)(1) only precluded the Secretary from citing those specific working conditions that were the subject of applicable Coast Guard regulations. In dissent, Commissioner Cleary rejected what he referred to as the majority's "nook and cranny" theory. He believed that the Coast Guard's regulations affecting the working conditions of seamen were so comprehensive that it would impair, if not destroy, the fabric of the Coast Guard's regulatory scheme to apply OSHA standards to situations for which the Coast Guard lacked applicable regulations. *9 BNA OSHC at 1782, 1981 CCH OSHD at p. 31,601.*

We have reconsidered the Commission's holding in Puget Sound.[6] We conclude that section 4(b)(1) in certain circumstances can create industry-wide exemptions from the OSH Act. Having examined the manner in which the Coast Guard has exercised its statutory authority to regulate the health and safety of seamen aboard vessels operating on navigable waters, we conclude that section 4(b)(1) precludes

6. Puget Sound involved vessels inspected and certificated by the Coast Guard, while the vessel in this case, the tugboat MAPU, was not so inspected and certificated. As pointed out later in this opinion, however, the Coast Guard has issued regulations directed at the protection of seamen for uninspected vessels as well as for vessels it inspects and certificates. Thus, there is no distinction between uninspected vessels and inspected and certificated vessels for the purpose of this case.

the Secretary from enforcing the OSH Act with respect to such working conditions. We overrule Puget Sound to the extent it is inconsistent with this holding.

III

Coast Guard regulations applicable to maritime operations are found in 46 C.F.R., Chapter I. These regulations were promulgated pursuant to the Coast Guard's statutory authority to promote safety on the navigable waters of the United States. See *Puget Sound, 9 BNA OSHC at 1773-74, 1981 CCH OSHD at pp. 31,593-94.* Chapter I contains a number of subchapters, some of which apply to specific types of vessels and some of which apply to other subjects. The following list of the subchapter titles generally illustrates the Coast Guard's regulatory scheme.

Subchapter	Title
A	Procedures Applicable to the Public
B	Merchant Marine Officers & Seamen
C	Uninspected Vessels
D	Tank Vessels
E	Load Lines
F	Marine Engineering
G	Documentation and Measurement of Vessels
H	Passenger Vessels
I	Cargo and Miscellaneous Vessels
I-A	Mobile Offshore Drilling Unite
J	Electrical Engineering
L-M	Reserved
N	Dangerous Cargoes
O	Certain Bulk Dangerous Cargoes

Subchapter	Title
P	Manning of Vessels
Q	Equipment, Construction, and Materials: Specifications and Approval
R	Nautical Schools
S	Reserved
T	Small Passenger Vessels (under 110 gross tons)
U	Oceanographic Vessels
V	Marine Occupational Safety and Health Standards[7]

As noted above, Dillingham's tugboat, the MAPU, was not inspected and certificated by the Coast Guard. The regulations in Subchapter C, entitled "Uninspected Vessels," apply to all vessels except those covered by the other subchapters of 46 C.F.R., Chapter I. 46 C.F.R. § 24.05-1(a) and accompanying Table 24.05-1(a). The only exceptions are vessels operating exclusively on inland waters which are not navigable waters of the United States, vessels while laid up and dismantled and out of commission, and certain vessels with title vested in the United States and used for public purposes. 46 C.F.R. § 24.05-1(a). Thus, any vessel not owned by the United States and operating on navigable waters is covered by Coast Guard regulations under either Subchapter C or some other subchapter of 46 C.F.R., Chapter I.[8]

---

7. This subchapter applies to commercial diving operations.

8. Relying on Coast Guard statements, in a Memorandum of Understanding with OSHA and in an advance notice of proposed rulemaking for diving standards, that the Coast Guard has statutory authority to regulate the working conditions of employees on vessels

(Cont'd)

(Cont'd)
subject to Coast Guard inspection and certification, the dissenting opinion suggests that the Coast Guard itself recognizes OSHA jurisdiction over uninspected vessels. We do not draw the same conclusion from these statements.

The Coast Guard unquestionably has specific statutory authority to inspect and certify certain types of vessels and to issue regulations governing such vessels. See *46 U.S.C. § § 361*-436. Various subchapters of 46 C.F.R., Chapter I deal exclusively with inspected and certificated vessels. However, the Coast Guard's reliance on its authority over inspected vessels to undertake certain regulatory activities does not imply that it believes it has no authority over uninspected vessels. The Coast Guard has statutory authority to "promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department. . . ." *14 U.S.C. § 2.* The Coast Guard's general statutory authority thus extends to all vessels in navigation. Cf. *Foremost Insurance Co. v. Richardson, 50 U.S.L.W. 4778, 4780-81* (June 23, 1982) (Coast Guard regulations designed to prevent collisions on navigable waters apply to all vessels without regard to their commercial or noncommercial nature). Moreover, the reference in the Memorandum of Understanding to the Secretary's maritime jurisdiction may simply be in recognition of the undisputed fact that the Secretary has jurisdiction over certain types of maritime work, such as longshoring and shipbuilding. See *Atlantic & Gulf Stevedores, Inc. v. OSHRC, 534 F.2d 541 (3d Cir. 1976)* (application of OSHA standard to longshoring operation); Bethlehem Steel Corp., *82 OSAHRC, 10 BNA OSHC 1673, 1982 CCH OSHD P26,083* (No. 77-1807, 1982) (application of OSHA shipbuilding standards).

The dissent also suggests that our decision renders a nullity an agreement between the Coast Guard and OSHA concerning the

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An examination of the regulations in Subchapter C indicates that the Coast Guard has made provision for protection against a vareity of hazards that may arise in the operation of uninspected vessels. Among the subjects regulated are navigation; ventilation; fire protection equipment; life preservers and other lifesaving equipment; the design, construction, and testing of boilers and machinery; liquified petroleum gas; backfire flame arrestors for gasoline engines; safety orientation and emergency instructions; and pilot ladders. In addition, various provisions of other subchapters, such as Subchapter P - entitled "Manning of Vessels" - apply to uninspected vessels as well as to other types of vessels. Moreover, the Coast Guard's authority to investigate maritime accidents and to enforce its regulations applies to uninspected vessels, as illustrated by the Coast Guard investigation that followed the accident

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enforcement of OSHA diving standards. This case does not involve diving standards and we have no occasion to consider whether or under what circumstances OSHA can enforce such standards. The dissent takes note of cooperation between the Coast Guard and OSHA, and suggests that this mechanism for resolving 4(b)(1) conflicts will be threatened by our decision. We note that if any significant degree of cooperation existed between agencies on the matters at hand, we would expect the Commission to be so advised. Since neither agency has advised the Commission of any such understanding, we must assume that recently developed memoranda of understanding are irrelevant to this litigation. In any event, it is our statutory responsibility to decide whether private employers have violated the Act as alleged by the Secretary, and agreements or cooperation between OSHA and other agencies cannot detract from an employer's right to have its section 4(b)(1) claim adjudicated by the Commission.

involved in this case. See 33 C.F.R. § 1.07-10. Thus, the Coast Guard has prescribed, and it enforces, regulations that govern the working conditions of seamen aboard both inspected and uninspected vessels operating on navigable waters.

IV

Prior to the OSH Act's passage, Congress had given authority to regulate particular working conditions to federal agencies other than the Secretary of Labor.[9] Congress believed that it would be beneficial to employee safety and health if agencies that had specialized expertise in regulating particular working conditions continued to do so. Thus, Congress intended that other agencies that had been given statutory authority to regulate occupational safety and health would be the dominant agencies in their particular areas, with the OSH Act applying only insofar as the other agencies had not exercised their statutory authority. See *Southern Pacific Transportation Co. v. Usery, supra, 539 F.2d at 391-92.*

As discussed above, the Coast Guard has issued extensive regulations applicable to all vessels operating on navigable waters except certain vessels owned by the United States. The Coast Guard regulations are directed at protecting

9. For example, prior to the passage of the OSH Act, Congress had enacted the Federal Coal Mine Health and Safety Act of 1969 and the Federal Metal and Nonmetallic Mine Safety Act, both of which were administered by the Department of the Interior. These statutes have since been superseded by the Federal Mine Safety and Health Act of 1977, *30 U.S.C. § § 801*-960, which is administered by the Department of Labor.

the health and safety of seamen. *Taylor v. Moore-McCormick Lines, Inc., 621 F.2d 88 (4th Cir. 1980); Clary v. Ocean Drilling and Exploration Co., 609 F.2d 1120 (5th Cir. 1980).* Thus, employers of seamen, such as Dillingham, must look to the Coast Guard regulations for the requirements they must comply with to protect their employees. Under the approach of the majority in Puget Sound, such employers would also be required to compare the Coast Guard regulations with OSHA regulations, determine which conditions of the work environment are not addressed by Coast Guard regulations, and comply with OSHA requirements directed at those working conditions. This approach necessarily assumes that the Coast Guard regulations are insufficient to provide adequate protection to seamen aboard vessels on navigable waters. It is thus inconsistent with the established rule that section 4(b)(1) does not permit an inquiry into the stringency of another agency's exercise of authority. "Once another Federal agency exercises its authority over specific working conditions, OSHA cannot enforce its own regulations covering the same conditions. Section 4(b)(1) does not require that another agency exercise its authority in the same manner or in an equally stringent manner." Mushroom Transportation Co., *73 OSAHRC 51/E10, 1 BNA OSHC 1390, 1392, 1973-74 CCH OSHD P16,881 at p. 21,591* (No. 1588, 1973). See also Northwest Airlines, Inc., *80 OSAHRC 87/B5, 8 BNA OSHC 1982, 1990, 1980 CCH OSHD P24,751 at p. 30,489* (No. 13649, 1980); Pennsuco Cement and Aggregates, Inc., *80 OSAHRC 47/A2, 8 BNA OSHC 1378, 1980 CCH OSHD P24,478* (No. 15462, 1980).

The Puget Sound majority's approach also places an unreasonable burden on employers to determine the

requirements with which they must comply. As Commissioner Cleary stated in his separate opinion:

> Such an approach also creates a regulatory labyrinth for employers who must review two sets of federal regulations in detail to determine where there are voids in one set of regulations which are susceptible to application of a standard from another set of regulations. In the ensuing uncertainty the goal of providing employees with a safe and healthful workplace can only suffer.

9 BNA OSHC at 1782, 1981 CCH OSHD at p. 31,601.

This case involves an alleged hazard to a seaman arising out of activities aboard a vessel operating on navigable waters. The Coast Guard, an agency with special expertise in maritime hazards, has exercised its statutory authority to prescribe standards and regulations governing the working conditions of seamen. Thus, the Secretary is precluded from enforcing the OSH Act with respect to those working conditions. Moreover, we note that the Coast Guard investigated the incident that led to this case and determined that it did not involve any violation of law or regulation. Nevertheless, the Coast Guard investigation resulted in the recommendation of measures intended to avoid similar incidents in the future.[10] Thus, the dominant agency in

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10. The dissenting opinion suggests that the Coast Guard's investigation may have been an exercise of its deepwater port jurisdiction rather than its jurisdiction over uninspected vessels. However, the fact that the Coast Guard was able to address the (Cont'd)

maritime safety has taken remedial action. Permitting the Secretary to also seek remedial measures through an enforcement action arising out of the same incident would thus result in the very duplication of federal agency effort that section 4(b)(1) is designed to avoid. See *Southern Railway Co. v. OSHRC, supra, 529 F.2d at 339;* Organized Migrants in *Community Action, Inc. v. Brennan, 520 F.2d 1161, 1167 (D.C. Cir. 1975).*

The section 5(a)(1) citation is vacated. SO ORDERED.

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broader problem that the fatal incident revealed does not suggest that it lacks jurisdiction over the cited working condition. If anything, it demonstrates that the Coast Guard is better able than OSHA to focus on the overall problem of safety on navigable waters due to its broad statutory authority over the subject.

Appendix

DISSENT BY: COTTINE

DISSENT:

COTTINE, Commissioner, dissenting:

Section 4(b)(1) of the Act, *29 U.S.C. § 653*(b)(1),[1] provides that OSHA is without authority to regulate working conditions covered by another agency when the other agency exercises its "statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health." Until recently,[2] the Commission has consistently required that the standards and regulations promulgated by another federal agency address the particular cited working conditions and have the "force and effect of law" in order to preempt OSHA jurisdiction.[3]

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1. Section 4(b)(1) states, in pertinent part, the following:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

2. See Consolidated Rail Corp., *OSAHRC, 10 BNA OSHC 1577, 1982 CCH OSHD P26,044* (No. 79-1277, 1982), petition for review filed, No. 82-3302 (3d Cir. June 28, 1892).

3. E.g., Puget Sound Tug & Barge Co., *81 OSAHRC 50/A2, 9 BNA OSHC 1764, 1981 CCH OSHD P25,373* (Nos. 76-4905 et al., 1981), appeals filed, No. 81-7406 (9th Cir. June 26, 1981) (OSHRC Docket No. 76-4905), No. 81-7405 (9th Cir. June 26, 1981) (OSHRC

(Cont'd)

Appendix

As I noted in my separate opinion in Consolidated Rail Corp., *OSAHRC, 10 BNA OSHC 1577, 1982 CCH OSHD P26,044* (No. 79-1277, 1982), petition for review filed, No. 82-3302 (3d Cir. June 28, 1982),

> Congress did not envision a perfunctory preemption of the Act's application under section 4(b)(1). It was well aware that there were other federal agencies concerned with safety and intimately familiar with the regulated industry. Nonetheless, Congress delegated authority for safety and health to OSHA in the absence of an exercise by a sister agency. Congress also provided the Commission with a statutory rule to assess the existence of another agency's exercise.

10 BNA OSHC at 1583, 1982 CCH OSHD at p. 32,711. I further noted that Congress recently reiterated its understanding of section 4(b)(1):

> OSHA's standards do not apply when another agency issues standards which affect occupational safety and health and which have the force and effect of law.

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Docket No. 76-5515), and No. 81-4243 (5th Cir. June 24, 1981) (OSHRC Docket No. 78-617) ("Coast Guard cases"); Northwest Airlines, Inc., *80 OSAHRC 87/B5, 8 BNA OSHC 1982, 1980 CCH OSHD P24,751* (No. 13649, 1980) appeal dismissed, No. 80-4222 (2d Cir. Mar. 31,1981).

House Comm. on Gov't Operations, Occupational Safety and Health Protection for Aviation Industry Employees — The Conflict Between FAA and OSHA, H.R. REP. No. 393, 97th Cong., 1st Sess. 2 (1981) (Emphasis added).

10 BNA OSHC at 1583 n., *1982 CCH OSHD at p. 32,711* n.

The burden of establishing a section 4(b)(1) exemption rests with the party claiming its application. See Puget Sound Tug & Barge Co., *81 OSAHRC 50/A2, 9 BNA OSHC 1764, 1981 CCH OSHD P25,373* (Nos. 76-4905 et al., 1981), and cases cited. The Respondent has not shown that the Coast Guard has the statutory authority to prescribe or enforce standards or regulations with respect to working conditions of employees aboard uninspected vessels other than certain specific conditions regulated by statute,[4] none of which are relevant to the cited condition in this case. Furthermore, the Coast Guard's general authority to investigate marine casualties does not constitute prescription or enforcement of "standards" or "regulations" within the meaning of section 4(b)(1). Puget Sound Tug & Barge Co., supra. Accordingly, my colleagues err in concluding that pursuant to section 4(b)(1) of the Act OSHA is precluded from enforcing the Act with respect to any working conditions aboard vessels in general and the cited working conditions on this vessel in particular.

In recognition of their overlapping authority, the Coast Guard and OSHA have established a cooperative relationship to resolve jurisdictional conflicts. See Part I,

4. See note 7, infra.

infra. The Commission reorders that relationship and leaves certain employees without the protection of any federal safety program in direct conflict with the Act's stated policy of assuring "so far as possible every working man and woman in the nation safe and healthful working conditions," *29 U.S.C. § 651*(b).

I

A.

My colleagues improperly rely on *14 U.S.C. § 2* as support for their conclusion that the Coast Guard has general regulatory authority over uninspected vessels. Since its inception in 1915 the Coast Guard has gradually acquired responsibilities previously assigned to other departments and agencies, including those vessel inspection duties once performed by the Bureau of Marine Inspection and Navigation. See *14 U.S.C.A. § 2* (1956) (Historical Note). Until it was abolished in 1946 the Bureau of Marine Inspection and Navigation conducted statutorily required inspections of vessels. *Pacific Shrimp Co. v. United States Dept. of Transportation, 375 F.Supp. 1036, 1040 (W.D. Wash. 1974)*. Since that time, vessel inspections have been conducted by the Coast Guard.d In 1949, Congress for the first time set forth a codification of the primary functions and responsibilities of the Coast Guard. *14 U.S.C. § 2* lists these primary duties. Id. The purpose of 14 U.S.C. was "to have outlined in general terms in one section the broad scope of the functions of the Coast Guard." Id. However, it is Title 46 of the U.S. Code that contains the "comprehensive pattern of federal legislation designed to insure the safety of marine

equipment" and defines the vessels covered by its provisions. *United States v. Gahagan Dredging Corp., 289 F.2d 639, 642 n. 6 (2d Cir. 1961).* "As is apparent on the face of the legislation . . . the purpose of the federal inspection statutes is to insure the seagoing safety of vessels subject to inspection." *Huron Portland Cement Co. v. City of Detroit, 382 U.S. 440, 445 (1960).*[5]

Federal inspection of steam vessels was begun in 1838 as a result of a series of disastrous boiler explosions. Id.; S. Rep. No. 886, 96th Cong., 2d Sess. 3292, 3293, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3292, 3393. In 1936, with the enactment of *46 U.S.C. § 367,* diesel propelled seagoing vessels of 300 gross tons and over were made subject to the vessel inspection laws. *Pacific Shrimp Co. v. United States, 375 F.Supp. at 1040.* The vessel involved in this case is a diesel propelled, 33 gross ton tugboat that is not subject to the federal inspection requirements. Cf. *Cargo Carriers, Inc. v. Humphrey, 206 F.2d 488 (D.C. Cir. 1953),* aff'g *Cargo Carriers, Inc. v. Snyder, 104 F.Supp. 258 (D.D.C. 1952).* As the D.C. Circuit observed, the purpose of vessel inspection laws is to promote

5. The Court's recent decision in *Foremost Insur. Co. v. Richardson, 50 U.S.L.W. 4778* (U.S. June 23, 1982), deals with a wrongful death action arising from the collision of two private pleasure boats on navigable waters. The Court simply concluded that the cause of action states a claim within the admiralty jurisdiction of the federal courts. None of the Court's references to the federal "Rules of the Road" promulgated by the Coast Guard, the standards adopted under the Motor Boat Act, or the holding that these regulations are universally applicable to commercial and non-commercial vessels, *50 U.S.L.W. at 4780-1,* has any relevance to this case.

safety at sea and the Coast Guard may properly treat a non-propelled tank barge attached to a 99 ton tugboat as a single unit, so as to impose safety requirements that would be inapplicable to either unit alone. *206 F.2d at 489.*

The parties do not dispute the fact that the vessel involved in this case is not an inspected and certificated vessel. Accordingly, it is unnecessary in this case to reconsider the primary issue in Puget Sound Tug & Barge Co., regarding whether the Coast Guard's exercise of its authority over inspected and certificated vessels is pre-emptive under section 4(b)(1). Nevertheless, my colleagues have overruled Puget Sound and have created an industrywide exemption that is broad enough to encompass even vessels not subject to the Coast Guard's safety regulations for inspected and certificated vessels.

According to a Memorandum of Agreement between OSHA and the Coast Guard on the development of occupational health standards for workplaces aboard inspected vessels,

> The Commandant of the U.S. Coast Guard has statutory authority, under the Marine Inspection Laws, to promulgate and enforce safety and health standards regarding working conditions of employees on vessels subject to Coast Guard inspection and certification.

45 Fed. Reg. 14739 (1980) (Emphasis added). Furthermore, according to the Department of Transportation,

> Under *46 U.S.C. 391,* with *46 U.S.C. 375* and 416, the Coast Guard is to issue regulations to ensure

> that inspected vessels have a "structure suitable for service," and "suitable accommodations" for passengers and crew and are, "in a condition to warrant the belief she may be used in navigation * * * with safety to life." . . . Therefore diving regulations for inspected vessels under these mandates would include rules for equipment and working conditions.

41 Fed. Reg. 29151, 29152 (1976) (advance notice of proposed rulemaking for commercial diving from vessels and structures that are under Coast Guard jurisdiction) (Emphasis added). However, according to the Commission majority in this case,

> The Coast Guard has prescribed, and it enforces, regulations that govern the working conditions of seamen aboard both inspected and uninspected vessels operating on navigable waters. (Emphasis added.)

My colleagues' holding assigns to the Coast Guard a much wider authority with respect to vessel safety than the Coast Guard has actually asserted.[6]

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6. In determining the extent of an agency's statutory authority to regulate the safety and health of employees, the Commission must give deference to the agency's reasonable interpretation of its own enabling legislation. *Northwest Airlines, Inc., 8 BNA OSHC at 1988, 1980 CCH OSHD P24,751 at p. 30,487.* Although in Puget Sound the Coast Guard claimed it was vested with "regulatory jurisdiction over inspected vessels", Coast Guard Brief at 5, it specifically disavowed sole regulatory jurisdiction over other vessels. At the oral argument in the Puget Sound case on April 17, 1979, the following dialogue was recorded:

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According to the Department of Transportation,

> The Coast Guard has extensive authority to regulate safety of life and property on vessels certified by the Coast Guard . . . Vessels under Coast Guard jurisdiction include vessels required to be certificated by the Coast Guard, regardless of their geographic location, including mobile offshore, semi-submersible drilling units. Facilities [under Coast Guard jurisdiction] include deepwater ports. . . .

40 Fed. Reg. 33681 (1975) (advance notice of proposed rulemaking for marine occupational safety and health standards

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> CHAIRMAN CLEARY: Would you claim sole jurisdiction over safety and health on all vessels?
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> LT. WOEPPEL: No. As I started out, inspected vessels are solely what I'm dealing with —
>
> CHAIRMAN CLEARY: Inspected vessels.

Transcript at 66. The Coast Guard representative further stated, with respect to the Coast Guard's interpretation of its regulatory authority:

> LT. WOEPPEL: . . . [I]t doesn't involve a lot of statutory interpretation or the agency or the Department doesn't have to do a lot of work in order to determine if these vessels are subject to regulation. The statutes are clear on what they cover in terms of types of vessels.

Transcript at 58.

for vessels and facilities under Coast Guard jurisdiction) (Emphasis added); see also *41 Fed. Reg. 29151, 29152 (1976)* (DOT advance notice of proposed rulemaking for commercial diving from vessels and structures that are under Coast Guard jurisdiction). Nevertheless, my colleagues conclude the following:

> [t]he Coast Guard has issued extensive regulations applicable to all vessels operating on navigable waters except certain vessels owned by the United States. [Emphasis added.]

In a "Memorandum of Agreement on Occupational Health Standards for Workplaces Aboard Inspected Vessels" issued jointly by OSHA and the Coast Guard, the agencies stated:

> Because both USCG and OSHA have statutory authority within the maritime industry, cooperation between the agencies is essential in the area of health standards development.

45 Fed. Reg. 14739 (1980). However, according to the Commission majority,

> The Coast Guard, an agency with special expertise in maritime hazards, has exercised its statutory authority to prescribe standards and regulations governing the working conditions of seamen. Thus, the Secretary is precluded from enforcing the OSH Act with respect to those working conditions.

In Puget Sound, the Commission accepted the Coast Guard's amicus argument that pursuant to its statutory authority the Coast Guard has developed its own regulatory scheme to promulgate and enforce standards regarding working conditions on vessels subject to Coast Guard inspection and certification.[7] The Coast Guard cases involved inspected and certificated vessels. This case does not involve an inspected and certificated vessel and, according to the Coast Guard's statement of authority and its enforcement activity, the vessel is not subject to the Coast Guard's general safety inspection and enforcement program.[8]

II

The narrow question presented by this case is whether the casualty and accident reporting requirements for uninspected vessels set forth at 33 C.F.R. Part 173 and the Coast Guard's general authority to investigate fatalities under *49 U.S.C. § 239* are preemptive "standards or regulations

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7. The uninspected vessel regulations in 46 C.F.R. Chap. 1, subchap. C do not derive from the Coast Guard's general authority to prescribe regulations for promotion of "safety to life" under *46 U.S.C. § § 391* & 395. Rather, they apply a limited number of specific uniform boating standards for all vessels pursuant to the Congressional directives set forth in the Federal Boat Safety Act of 1971, *46 U.S.C. § § 1451*-1489, and the Motorboat Act of 1940, as amended, *46 U.S.C. § § 526*-526(t), that certain specific conditions be uniformly regulated for all vessels, e.g. fire protection and lifesaving appliances. See 46 C.F.R. § § 24.01-1 and 24.01-10.

8. See Puget Sound Tug & Barge Co., supra; *45 Fed. Reg. 13739 (1980); 41 Fed. Reg. 29151, 29152 (1976); 40 Fed. Reg. 33681 (1975).*

affecting occupational safety or health" within the meaning of section 4(b)(1).

The Coast Guard's post-accident authority to investigate marine casualties does not constitute prescription or enforcement of "standards" or "regulations" having the force and effect of law within the meaning of section 4(b)(1).[9] Puget Sound Tug & Barge Co., supra; see Consolidated Rail Corp., supra (Cottine, Commissioner, dissenting in part and concurring in part); Northwest Airlines, Inc., supra.[10] Furthermore, it is anomalous to conclude that Congress intended the Act's enforcement to be preempted by a sister agency's limited authority to investigate the cause of injuries or fatalities at a worksite and recommend safety measures when "the goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors." *Mineral Industries & Heavy Constr. Group v. OSHRC, 639 F.2d 1289, 1294 (5th Cir. 1981),* cited

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9. Contra *Dunlop v. Avondale Shipyards, Inc., No. 75-1874 (E.D.La. 1976) (3 BNA OSHC 1950, 1975-76 CCH OSHD P20,415);* see *Taylor v. Moore-McCormack Lines, Inc., 621 F.2d 88 (4th Cir. 1980); Clary v. Ocean Drilling & Exploration Co., 609 F.2d 1120* (5th Cir. 1980.

10. The majority concludes that the investigation following the fatality in this case illustrates that the Coast Guard's authority to investigate accidents and enforce regulations applies to uninspected vessels. However, my colleagues fail to note that the Respondent did not participate in the investigation beyond the filing of the accident report. It is just as likely that the Fourteenth Coast Guard District was exercising its deep-water port safety jurisdiction, see *41 Fed. Reg. 29151, 29152 (1976); 40 Fed. Reg. 33681 (1975),* over the HIRI Anchorage in the Pacific Ocean off Barbers Point, Oahu, Hawaii. See 33 C.F.R. § § 3.70, 110.236.

in Faultless Div., Bliss Laughlin Indus., Inc., No. 81-1740, slip op. at 12 (7th Cir. Mar. 30, 1982).

III

A.

The mere potential for duplicative or conflicting enforcement activity does not preempt OSHA jurisdiction. Instead, other mechanisms exist for cooperative resolution of conflicts resulting from overlapping jurisdiction and apparently have been employed by OSHA and the Coast Guard on more than one occasion. For example, in recognition of OSHA's general safety and health authority under the Act and the Coast Guard's authority under the Marine Inspection Laws over vessels subject to inspection and certification, the two agencies entered into a "Memorandum of Agreement on Occupational Health Standards for Workplaces Aboard Inspected Vessels." *45 Fed. Reg. 14739 (1980).* Second, appended to OSHA's Emergency Temporary Standard on Diving Operations, 29 C.F.R. § 1910.401 (1977), *41 Fed. Reg. 24272 (1976),* was a Memorandum of Understanding between OSHA and the Coast Guard providing for joint inspection of inspected vessels, enforcement of OSHA diving standards pursuant to the Act, joint rulemaking procedures for permanent standards, and termination of the Memorandum of Understanding upon the effective date of Coast Guard diving standards. *Id. at 24291* app.[11] On July 22, 1977, OSHA published its final commercial

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11. If, as my colleagues maintain, an industrywide exemption under section 4(b)(1) existed with respect to all vessels in navigation, the Act would have been unenforceable and the Memorandum of Understanding would be a legal nullity. See also congressional discussion of diving standards in Part III-B, infra.

diving standards. *42 Fed. Reg. 37668 (1977)*. On November 16, 1978, the Coast Guard published "regulations governing commercial diving operations from vessels and facilities including vessels required to have a Certificate of Inspection." *43 Fed. Reg. 53678 (1978)*. In the preamble the Coast Guard acknowledged a conflict between the two agencies on decompression chamber requirements and stated:

> [T]he Coast Guard agrees with the general philosophy of the commentators regarding a single Federal standard for the same marine activity and has been discussing the subject with OSHA to resolve the issue.

43 Fed. Reg. at 53680.

Clearly, the Coast Guard is aware of its jurisdictional overlap with OSHA and recognizes that OSHA regulations are enforceable unless and until the Coast Guard regulations addressing the particular working conditions are effective. The Coast Guard's understanding of the application of section 4(b)(1) is consistent with the Commission's view in Puget Sound. For example, OSHA diving regulations are no longer applicable to inspected vessels and other facilities that are subject to Coast Guard diving regulations. However, they are applicable to uninspected vessels and facilities not regulated by the Coast Guard. The Coast Guard apparently views cooperation between the two agencies with statutory jurisdiction as the appropriate means of resolving conflicts. Furthermore, as is discussed in part III-B, infra, Congress has the same understanding. Under the majority's view in this case any conflict would be resolved by eliminating

OSHA jurisdiction, whether or not the Coast Guard regulations are enforceable with respect to the working conditions involved.

B.

The cooperative efforts between the Coast Guard and OSHA in the development of standards for vessels and activities not highly regulated by the Coast Guard were reported to the Commission by the Coast Guard in its amicus brief in Puget Sound, the only proceeding in which the Commission invited Coast Guard amicus participation. This interagency cooperation and the need to continue the same was noted in the House report on the Outer Continental Shelf Lands Act Amendments of 1978:

> The committee determined that special provision should be be made as to worker's safety regulation and enforcement on the OCS. Section 4(e) [*33 U.S.C. § 1333*(e)] of the OCS Act of 1953 provided that the Coast Guard had the responsibility for the safety of any person, which would include occupational safety on OCS facilities and in adjacent waters.
>
> The Occupational Safety and Health Act *(29 U.S.C. 651)* provides authority for the Secretary of Labor, through the Occupational Safety and Health Administration, to prepare interim worker's safety regulations and standards and, unless ousted by another agency or department, permanent standards, for all areas including the Shelf.

The committee is aware of a continuing controversy as to whether OSHA or the Coast Guard should exercise regulatory authority over OCS worker's safety and health.

Some witnesses suggested that OSHA, within the Department of Labor, be given sole responsibility, or at least lead agency authority as to worker's safety. Others opposed any agency other than Coast Guard being involved.

Representatives of Coast Guard and OSHA detailed to the committee their cooperative efforts to promulgate and enforce worker's safety rules. For example, Coast Guard and OSHA have recently worked together to prepare final standards on commercial diving operations, applicable to OCS and non-OCS activities. *41 Fed. Reg. 37650-37674* (July 22, 1977). These standards were formally promulgated by the Department of Labor.

As a practical matter, both OSHA and the Coast Guard will continue to function on the OCS. OSHA has prepared not only divers standards but also numerous general industry and construction standards currently in force in the OCS. OSHA and the Coast Guard have each trained diving inspectors. OSHA will maintain responsibility for health standards, even if final safety standards are promulgated by Coast Guard. OSHA administers a comprehensive health and safety law which

establishes a "general duty" to maintain a safe place of work and there is no corresponding responsibility under Coast Guard enabling legislation. OSHA will always be in the position of filling in the gaps in the regulatory effort of the Coast Guard.

Subsection (c)(2) intended to avoid possible interagency conflict and duplication of effort. Specifically, by overruling the "ousting language" of the Occupational Safety and Health Act, OSHA and Coast Guard are to coordinate activity to prepare and enforce regulations so as to avoid duplication and maximize employee protection. Without such a provision, duplication and conflict might occur.

For example as to diving operations, Coast Guard could by existing law regulate safety and OSHA health; yet as a practical matter, in the field, health and safety often merge in a single operation. Similarly under existing law, Coast Guard would protect the safety of divers below the surface and OSHA protect the deck crew.

The committee believed that the best way to resolve this problem is not the status quo which has led to confusion, litigation and employee resistance. Rather it is to give clear direction to the administration to develop interagency cooperative arrangements and resolve all jurisdictional conflicts. Thus, this subsection was

> included, not giving lead agency responsibility to OSHA, not infringing on Coast Guard jurisdiction, but providing authority for both to work together.

H. Rep. No. 590, 95th Cong., 2d Sess. 157-8 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 1450, 1563-4.

The Outer Continental Shelf Lands Act of 1953 contained an internal conflict between the safety responsibilities of the Coast Guard, set forth at *33 U.S.C. § 1333*(e), and that of the Department of Labor, set forth at *33 U.S.C. § 941*. The statute was amended in 1958 so as to grant sole authority to the Coast Guard as to matters within the scope of *43 U.S.C. § 1333*(e). See *Pure Oil Co. v. Snipes, 293 F.2d 60, 66-8 & n. 8-12 (1961)*. Subsequently, the Occupational Safety and Health Act of 1970 was enacted, assigning to the Department of Labor general authority to provide employees with safe and healthful workplaces. In its review of the background to OCS related legislation, the 1978 House report noted:

> The Department of Labor and the Department of Health, Education, and Welfare. — Both Departments have responsibilities under the Occupational Safety and Health Act of 1970. HEW makes evaluations of working conditions and provides technical assistance to employers. The Labor Department is responsible for establishing and enforcing interim and some final rules established to provide employees with a safe working environment. OSHA retains jurisdiction

> over issues which are not specifically regulated by the U.S. Coast Guard or U.S. Geological Survey. OSHA has no regulations which pertain solely to the OCS, but it does have a new diving standard, still subject to modification, which does directly affect operations in this area. All OSHA General Industry, Construction, and Maritime Standards have general applicability on the OCS. Currently OSHA, USGS and USCG are attempting to clarify overlapping jurisdictions and regulations.

— H. Rep. No. 590, supra, at 61, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 1468.

With respect to general OCS safety responsibility and overlapping OSHA-Coast Guard authority, the House Conference Report on the Outer Continental Shelf Lands Act Amendments noted the following:

> In adopting the language providing for OCS workers' safety regulations to be promulgated by the Coast Guard, and also providing for the existing authority of the Secretary of Labor (through the Occupational Safety and Health Administration) as to workers' safety to be retained, the Conferees clearly intend neither to reduce, nor to add to existing OSHA authority, under section 466(1) [sic] of the Occupational Safety and Health Act.

This section merely requires the Coast Guard to undertake expedited action where it deems it necessary to regulate hazards currently unregulated by the Government. Under its existing authority, and section 4(b)(1) of the Occupational Safety and Health Act, the Coast Guard may take any appropriate action necessary to regulate any hazard, and may over time displace the applicability of OSHA standards to other working conditions through exercise of appropriate rulemaking actions. However, the conferees intend that consultation with OSHA in standards development and administration, and opportunity for participation by interested parties in any such Coast Guard action, will assure that employees receive no less protection than under existing standards. Consistent goals contained in recent OSHA-Coast Guard agreements - maximizing the safety and health protection of employees, avoiding duplication of effort, and avoiding undue burden on the maritime industry - are also endorsed by the confereees.

H. Conf. Rep. No. 1474, 95th Cong., 2d Sess. 110, reprinted in 1978 U.S. CODE CONG. & AD. News 1674, 1709.

There is no doubt that Congress recognizes existing overlapping jurisdiction, recognizes that OSHA authority is preempted only by a Coast Guard exercise of authority over specific working conditions, and endorses the ongoing cooperative efforts of OSHA and the Coast Guard to resolve jurisdictional conflicts while providing for the safety and

health of employees. It is also clear that Congress views continued OSHA jurisdiction over unregulated safety and health matters to be preferred over the type of industrywide exemption my colleagues have endorsed by their decision in this case.

IV

The administrative law judge below concluded "that the preemptive provisions of section 4(b)(1) of the Act do not apply to the instant conditions." ALJ slip op. at 15. He based his holding on his conclusion that the "Coast Guard has not promulgated and does not enforce regulations and standards governing safe working conditions for a seaman working on an uninspected tugboat." ALJ slip op. at 19. The judge's decision should be affirmed.